REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(COMMERCIAL AND TAX DIVISION) (MILIMANI LAW COURTS)

MISCELLANEOUS COMMERCIAL APPLICATION NO. E470 OF 2016

EPCO BUIDERS LIMITED…… ……. APPLICANT

-VERSUS-

KENYA BUREAU OF STANDARDS…… RESPONDENT

RULING

Introduction and Background

1. This Ruling determines the application by the Respondent – Kenya Bureau of Standards (KEBS) dated 13th March 2025 seeking, inter alia, to stay delivery of the ruling scheduled for 20th March 2025 and to admit further documents. The application is supported by the affidavit of Luise Rasanga.

2. The Applicant, EPCO Builders Limited (EPCO), opposed the application through a Replying Affidavit sworn by Mayur R. Varsani on 9th April 2025 and written submissions filed on 4th June 2025.

3. The facts giving rise to the present application are that by an arbitral award rendered on **15th September 2016**, the arbitral tribunal issued an award in favour of EPCO, against KEBS, directing the payment of **Kshs.12,071,747.67/= together with compound interest at 16% per annum until payment in full**.

4. Following the delivery of the award, the KEBS made a payment of **Kshs.5,888,918.85/=** on **2nd September 2021**. EPCO, however, moved this Court by way of an application dated **21st June 2023,** seeking recognition and enforcement of the arbitral award under Sections 36 and 37 of the Arbitration Act**.** According to EPCO, a sum of **Kshs.9,894,868.23/=** was still outstanding was **Kshs.9,894,868.23/=**, and that the amount continues to accrue compound interest pursuant to the terms of the award.

5. KEBS, in opposition to the EPCO's application for recognition and enforcement, filed Grounds of Opposition and submissions on **19th November 2024**, contending that the award had been fully settled and that any further sums claimed by the Applicant were attributable solely to interest accumulated due to the Applicant's refusal to accept payment and its pursuit of appellate processes. Ruling on the application was reserved for 20th March 2025.

6. Before delivery of the Ruling, the Respondent (KEBS) on 13th March 2025, filed the present Notice of Motion seeking to stay delivery of the ruling and to admit further documents said to demonstrate that the award had been fully settled. According to KEBS, the documents it seeks to introduce only came to the attention of the current Chief Manager Legal Services following changes in KEBS management.

7. The Application proceeded by way of written submissions. The Respondent – KEBS filed its submissions dated 24th March 2025, whilst the Applicant – EPCO filed its submissions dated 4th June 2025.

The Respondent's (KEBS) Case

8. In support of its application dated 13th March 2025, KEBS contended that the documents it seeks to introduce are critical since they are intended to demonstrate that the arbitral award was fully settled as at 2016. It relies on the payment of Kshs.5,888,918.85/=, which EPCO Builders Limited admitted to having received, and submits that this amount constituted full satisfaction of the award.

9. According to KEBS, any further sums now claimed by the Applicant are said to arise solely from interest accumulated due to EPCO's own refusal to provide account details for remittance in 2016, thereby frustrating settlement. KEBS further pointed out that EPCO had filed a Notice of Appeal in 2017, which has never been withdrawn or prosecuted, as evidence that EPCO had objected to the settlement, thereby allowing interest to balloon artificially.

10. The Respondent maintained that enforcement of the award with compounded interest would result in unjust enrichment of EPCO and unjust benefit contrary to public policy. It emphasizes that the additional sums now demanded, amounting to over Kshs. 8 million beyond the principal, would drain public coffers and confer an inequitable advantage on EPCO.

11. The Respondent submitted that the delay was not deliberate but occasioned by the passage of time and difficulty in retrieving old records. It maintained that EPCO has always been aware of the facts contained in the documents sought to be introduced, and therefore, no prejudice would be occasioned by their admission.

12. The Respondent therefore urged the Court to exercise its discretion under Order 50 Rule 6 of the Civil Procedure Rules to admit the documents in the interest of justice.

The Applicant's (EPCO) Case

13. The Applicant, EPCO Builders Limited, opposed the application, arguing that the arbitral award dated 15th September 2016 directed payment of Kshs.12,071,747.67/= together with compound interest at 16% per annum until payment in full. The Applicant emphasizes that under Section 32A of the Arbitration Act, arbitral awards are final and binding unless set aside under Section 35. The Respondent has not taken any steps to set aside the award, and therefore, the award remains enforceable as a decree of the court pursuant to Section 36.

14. On the allegation by KEBS that the arbitral award has been fully satisfied as at 2016, EPCO, while admitting receipt of a sum of **Kshs.5,888,918.85/=** on 2nd September 2021, maintained that this was only a partial payment. According to its calculations, the outstanding balance as at that date was **Kshs. 6,292,471.43/=**. ECPO annexed detailed computations showing that as at 31st March 2025, the total balance due, inclusive of compound interest, stood at **Kshs. 9,894,868.23/=**.

15. EPCO asserted that the compound interest claimed is not a penalty but a substantive part of the arbitral award. The Respondent's attempt to disregard or alter the interest terms amounts to a collateral attack on the award, which this Court cannot entertain.

16. According to EPCO, the instant application by KEBS is an abuse of the court process, filed on the eve of ruling after repeated delays in filing responses. It argues that the documents sought to be introduced

were always within the Respondent's possession and that their belated introduction is a tactical maneuver intended to delay enforcement of the award.

17. In the premises, EPCO urged this Court to dismiss the instant application and that the Court proceeds to enforce the arbitral award, recognizing the partial payment but enforcing the outstanding balance together with continuing compound interest.

Analysis and Determination

18. I have carefully considered the Respondent's Notice of Motion dated 13th March 2025, the Supporting Affidavit of Luise Rasanga, the Replying Affidavit of Mayur R. Varsani, the rival submissions of counsel, and the applicable law. The sole issue for determination is whether the Respondent has satisfied the threshold for admission of further documents at this stage.

19. Order 50 Rule 6 of the Civil Procedure Rules, 2010 provides the legal framework governing admission of further documents, as follows: -

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
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> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

20. From the above, it is clear that Order 50 Rule 6 of the Civil Procedure Rules permits enlargement of time and introduction of additional evidence, but only where the applicant demonstrates that such evidence could not have been obtained earlier with reasonable diligence.

21. In Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR), the Supreme Court observed as follows on the question of admission of additional evidence:

> "There are no authorities on what principles or conditions this Court may allow an Application such as the present, but our opinion is that authorities or decided cases which are relevant to this Court's discretion to admit additional evidence on appeals to it do provide useful guidance for that purpose and are of persuasive value. We have in mind: Ladd Vs Marshall (1954) 3 All ER 745 at 148 Skone Vs Skone (1971), 2 All ER 582 at 586; Langdale Vs Danby (1982) 3 ALL ER. 129 at 137; Sadrudin Shariff Vs Tarlochan Singh (1961) EA.72, Elgood Vs Regina (1968) EA 274; American Express International Vs Atulkimar S. Patel, Application No.8B, of 1986 (SCU) (unreported); Karmali Vs Lakhani (1958), EA.567 and Corbett (1953), 2 ALL ER, 69. A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:
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> (i) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time

of the suit or petition by, the party seeking to adduce the additional evidence;

(ii) It must be evidence relevant to the issues;

(iii) It must be evidence which is credible in the sense that it is capable of belief;

(iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;

(v) The affidavit in support of an Application to admit additional evidence should have attached to it, proof of the evidence sought to be given;

(vi) The Application to admit additional evidence must be brought without undue delay.

These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put its full case before the court. We must stress that for the same reason, courts should be even more stringent to allow a party to adduce additional evidence to re-open a case, which has already been completed on appeal."

22. It is evident from the Mahamud case (supra) that the Supreme Court stressed that additional evidence is only to be admitted where it is directly relevant, could not have been obtained with reasonable diligence, and must not be used to patch up weak points in a party's case.

23. In the present case, KEBS concedes that the documents were always within its possession, only surfacing upon change of personnel. At Paragraph 4 of the Affidavit in support of the application, it was deponed that:

"4. THAT these facts were within the purview of the former Chief Manager Legal Services who has since left employment at the Applicant Bureau, and the same came to my attention upon my taking up the position of Chief Manager Legal Services at the Bureau and after issuance of the Ruling date herein."

24. The above explanation does not, in the view of the Court, meet the threshold of reasonable diligence. KEBS has provided no explanation as to why the "former Chief Manager Legal Services" was unable to file the documents within the stipulated timelines.

25. Further, I note that the Respondent's submissions in support of the application centered more on whether or not it was against public policy to pay interest as ordered by the arbitral tribunal. This, in my view, is a matter to be argued in an application for recognition and enforcement, or setting aside of an arbitral award (as the case may be), and not in an application for admission of additional documents.

26. In the premises, I find the Respondent's application dated 13th March 2025 seeking to admit further documents unmerited. Accordingly, I dismiss the same with costs to the Applicant.

27. Further, I direct that the Applicant's application dated **21st June 2023** seeking recognition and enforcement of the arbitral award dated 15th September 2016 be set down for hearing on a priority basis.

28. It is so ordered.

SIGNED, DATED, and DELIVERED IN VIRTUAL COURT THIS

15TH JANUARY 2026

ADO MOSES

JUDGE

In the presence of: -

C/A – *Moses*

Mwenesi.....for the Applicant

Joy Anami..... for the Respondent